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No. 241, Misc.

In The
Supreme Court of the United States

OCTOBER TERM, 1949

OWEN CAUDLE BUTNER,
Petitioner and Appellant below,
vs.
STATE OF NEVADA,
Respondent and Appellee below.

No. 241, Misc.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT

The petitioner petitions this Court for a Writ of Certiorari to review the final judgment of the Supreme Court of the State of Nevada, the highest Court of the State, affirming the judgment and sentence of death imposed upon petitioner by the Second Judicial District Court of the State of Nevada, in and for the County of Washoe. The opinion of the State Supreme Court being reported in (65 Nev. .....) 206 Pac. 2d 253, and set forth in the record in this Court at pages 23–31. Rehearing was denied August 11, 1949, R. 32. The petitioner invokes the jurisdiction of this Court to review the final judgment of the State Court by Certiorari upon the alleged ground that federal questions were raised in the trial court,

1. By objection to the opinion testimony of State's lay witness, Jack Watkins, on the issue of insanity, because such witness was incompetent, having observed the defendant (petitioner here) for a period of only three to eight minutes and was permitted by the trial court to state his opinion, and

2. That the denial of a new trial upon such ground was a denial to defendant of a fair trial and due process of law. Pet. Cert. 4, 5.

Petitioner then alleges that federal questions were raised in the Supreme Court of the State of Nevada,

1. That the trial court committed error in overruling objections to questions propounded by counsel for the State to witness Jack Watkins in rebuttal to the alleged insanity of the defendant, R. 17–19, and

2. That the trial court committed error in refusing to grant appellant a new trial specified in appellant's Notice of Motion for New Trial, R. 8–12, 20. Pet. Cert. 5.

Petitioner contends that this Court has jurisdiction to review the judgment in question because petitioner has been denied the right and privilege of due process of law, and the equal protection of the laws, guaranteed to him as a citizen of the United States under Section 1, Article XIV of the Constitution of the United States. Petitioner further contends that this Court has jurisdiction to review the judgment because the Supreme Court of Nevada has decided a federal question of substance not heretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. Pet. Cert. 3, 4.

In brief the contentions of petitioner that alleged federal questions were submitted to the trial court and the State Supreme Court are based solely upon the alleged error in permitting a lay witness to state his opinion as to the sanity of petitioner, as defendant in the trial court, upon observation of the defendant of from three to eight minutes during the actual murder committed by the defendant. The alleged federal questions are premised upon no other ground.

State of the Record Upon Which Petitioner Claims Federal Questions Were Submitted to the State Courts

The record upon which petitioner relies as showing the alleged federal questions were raised in the trial court and in the State Supreme Court as lodged in this Court, is as follows:

1. Assignment of error to the State Supreme Court No. 2. R. pages 17–19. Such assignment nowhere contains any objection based upon the Fourteenth Amendment to the Constitution of the United States or any part thereof. The error therein assigned was based upon the alleged departure of the trial court from the rule announced in State v. Lewis, 20 Nev. 333, purely a question of State law.

2. The trial court record of the testimony of witness Jack Watkins and his stated opinion that the defendant was sane at the moment of the commission of the murder, set forth at pages 44–53 of the record in this Court, contains no objection interposed in behalf of the defendant that the testimony of the witness was incompetent and that defendant was therefore deprived of due process and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

3. That the Notice of Motion for New Trial and Order Staying Proceedings Until the Motion for New Trial Disposed Of contain no reference to a federal question or its submission for the consideration of the trial court. R. 8–12.

4. There is no reference or indication that a federal question was submitted to or decided by the Supreme Court of Nevada in the opinion of that Court on the appeal, or in its opinion denying rehearing. R. 23–31, 32.

5. That the first intimation that a federal question was involved in the cause, as shown by the record in this Court, is found in the Petition * * * to the State Supreme Court For An Order Staying The Execution Of The Judgment Of The Trial Court And To Enable Said Owen Caudle Butner To Apply For And Obtain A Writ Of Certiorari From The Supreme Court Of The

United States, filed August 26, 1949. R. 33–34. Nowhere in such petition, nor the order of the State Court staying execution (R. 35), is there any showing that the alleged federal question had theretofore been submitted to either of the State Courts. The claim of a federal question first presented to the State Supreme Court in such an application comes too late. Scott v. Platt, 137 Pac. 2d 975; Gaines v. Washington, 277 U. S. 81.

The Record Lodged in This Court Discloses That the Federal Questions Relied Upon by Petitioner Were Not Raised in, Submitted to Nor Decided by the State Court

The rule of this Court is that in order to give it jurisdiction to review the judgment of a State Court, because of denial by the State Court of any right, title, privilege or immunity claimed under the Constitution of the United States, it must appear on the record that such title, right, privilege or immunity was specially set up or claimed at the proper time and in the proper way. That in order to give the Supreme Court the power to revise a judgment of a State Court it must appear upon the record filed with it that the point relied upon was made in the State Court and decided adversely, and that the section of the Constitution of the United States relied upon was distinctly brought to the attention of the State Court. Farney v. Towle, 66 U. S. 350; Hoyt v. Thompson, 66 U. S. 518; Worthy v. County Commrs., 76 U. S. 565; Leeper v. Texas, 139 U. S. 462; Miller v. Texas, 153 U. S. 535; Miner v. Georgia, 183 U. S. 559; Thomas v. Iowa, 209 U. S. 258.

Neither the petition for a rehearing, nor the petition for writ of error, nor the assignments of error in the Federal Supreme Court, nor certification of briefs by Clerk of the State Court, can cure the failure of the record to show that a federal question was raised and decided which would confer jurisdiction on the Federal Supreme Court. Harding v. People, 196 U. S. 78. Same effect, Empire State-Idaho Min. & Dev. Co. v. Hanley, 198 U. S. 292; Mellon v. O'Neil, 275 U. S. 212.

The contention made in the highest court of a state may not be enlarged for the purpose of invoking the jurisdiction of the Federal Supreme Court by assignment of errors made to bring the case to that Court. Cleveland & Pittsburg R. R. Co. v. City of Cleveland, 235 U. S. 50.

Writ of Certiorari will be dismissed where granted upon the erroneous supposition that petitioner had properly raised and relied upon the indicated federal questions in the State Court. Missouri Pac. R. R. Co. v. Hanna, 266 U. S. 184.

> "It is essential to the jurisdiction of the Supreme Court on certiorari to a state court that it appear affirmatively from the record not only that a Federal question was presented for decision in that court, but also that its decision of the Federal question was necessary to the determination of the cause, and that the question was actually decided or that the judgment as rendered could not have been given without deciding it. Jurisdiction of the Supreme Court on certiorari cannot be founded on surmise as to what, if any, Federal question the state court rested its opinion and decision upon; nor can a claim of jurisdiction be sustained by reference to briefs or statements which are not part of the record." 54 Am. Jur. 901, Sec. 263, citing McGoldrick v. Gulf Oil Corp., 309 U. S. 2; Lynch v. New York, 293 U. S. 52.

On certiorari to the Supreme Court of Missouri in Williams v. Kaiser, 323 U. S. 471, this Court said at pages 477, 478:

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v. Hanan, 300 US 14, 18, 81 L ed 476,

478, 57 S Ct 350; Lynch v. New York, 293 US 52, 79 L ed 191, 55 S Ct 16. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. Klinger v. Missouri, 13 Wall. (US) 257, 263, 20 L ed 635, 637; Walter A. Wood Mowing & Reaping Mac. Co. v. Skinner, 139 US 293, 297, 35 L ed 193, 195, 11 S Ct 528; Allen v. Arguimbau, 198 US 149, 154, 155, 49 L ed 990, 993, 25 S Ct 622; Lynch v. New York, 293 US 52, 79 L ed 191, 55 S Ct 16, supra. We adhere to those decisions."

Supreme Court's consideration of a case will be limited to the questions presented by the petition for the Writ of Certiorari. Crown Cork & Seal Co. v. Ferdinand Gutmand Co., 304 U. S. 159; General Talking Pictures v. Western Electric Co., 304 U. S. 175; Wilson v. Cook, 327 U. S. 474. And such questions must be federal questions asserted and presented to the State Court. Meredith v. Winterhaven, 320 U. S. 228; Hartford L. Ins. Co. v. Johnson, 249 U. S. 490; 54 Am. Jur. 881, Sec. 243; Herndon v. Georgia, 295 U. S. 441; New York ex rel. Cohn v. Graves, 300 U. S. 308; Anno. 79 L. ed. 1539.

The Fourteenth Amendment

This Court said in Miner v. Georgia, 183 U. S. 559, "The requirements of the 14th Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular State, and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government." And in Avery v. Alabama, 208 U. S. 444, it is held that the Fourteenth Amendment does not limit the power of the States to deal with crimes committed within their borders, and does not bring to the test of a decision of the

Supreme Court every ruling made in the course of a State trial, and it is further held that, consistent with the preservation of constitutional balance between State and Federal Sovereignty, the Supreme Court must respect and is reluctant to interfere with the States' determination of local policy. Such is the doctrine also enunciated in Leeper v. Texas, 139 U. S. 462. In Buchalter v. New York, 319 U. S. at page 430, this Court said:

> "But the (14th) amendment does not draw to itself the provisions of State Constitutions or State laws. It leaves the States free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate; and does not permit a party to bring to the test of a decision in this Court every ruling made in the course of a trial in a State court."

The Specifications of Errors

Petitioner, at page 11 of his brief, sets forth his specification of errors as Points I, II and III, which may be briefly stated as follows:

Point I, that the Supreme Court of Nevada erred in holding admissible the opinion of a lay witness on the issue of insanity, where the witness had observed the accused for a period of three to eight minutes, in that such decision was contrary to the decisions of this Court, the common law, the laws of the State of Nevada or any other State of the Union, and therefore petitioner has been subjected to arbitrary powers of government and deprived of equal and impartial justice under law.

Point II, that the Supreme Court of Nevada erred in holding that it was not an abuse of discretion for the trial judge to admit the opinion of the lay witness and that the admission of such opinion was not a violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Point III, that the Supreme Court of Nevada erred in holding

that it was not an abuse of discretion for the trial judge to permit the lay witness to state his opinion as to the sanity of the petitioner, and that such holding was not inconsistent with substantial justice and did not deny petitioner a fair and impartial trial.

The Facts

It is important to keep in mind the facts upon which lay witness, Jack Watkins, based his opinion that the petitioner was sane at the very moment of the commission of the crime. Such facts are detailed in the record before this Court at pages 39–43 thereof, being the testimony of the witness as given in the case in chief. Later he was recalled by the State as a rebuttal witness on the issue of insanity and there gave his opinion. R. 44–52.

The testimony of the witness relative to the actual commission of the crime discloses a rather remarkable situation and beyond any question discloses that the witness was in a position to closely observe every move made by the petitioner as the cold deliberate action of a man bent on killing his victim.

The petitioner has cited no case where the opinion of the lay witness on the question of insanity was based upon such facts as testified to by witness Jack Watkins.

The Petitioner Has Not Been Subjected to Arbitrary Powers of Government Nor Deprived of Equal and Impartial Justice

(Point I)

1. The decision of the Supreme Court of Nevada is not contrary to the decisions of this Court. Petitioner relies upon Turner v. American Security and Trust Co., 213 U. S. 257, as the decision with which the Nevada decision is not in accord. The Turner case purports to state the rule governing the admission of lay witness' testimony on the issue of insanity in the courts of the United States. Petitioner agrees that the rule as to such testimony in the Nevada courts is well stated in State v. Lewis, 20 Nev. 333, and State v. Plunkett, 62 Nev. 265. Pet. Brief

20. The rule as stated in State v. Lewis is substantialy the same as that stated in the Turner case. It is to be well noted, however, that this Court in the Turner case stated:

> "No general rule can well be framed which will govern all cases, and an attempt to do that would multiply exceptions and new trials. The responsibility for the exercise of the judicial power of determining whether a given witness has the qualifications which will permit him, to the profit of the jury, to state his opinion upon an issue of this kind, may best be left to the judge presiding at the trial, who has a comprehensive view of the issue and all of the evidence, and the witness himself before his face. This is not to say that, in a very clear case, an appellate court ought not to review the discretion of the trial judge. For instance, if it should appear that the witness had never spoken to the testator or *seen any significant act*, (italics supplied) but merely observed him driving from day to day through the streets, and the opinion of such witness as to sanity had been received, it would be the duty of the appellate court to correct the error."

Certainly in the case at bar lay witness Jack Watkins was a spectator and participant in a most significant act. His testimony spoke volumes when he testified, "I noted at the time of the occurrence that when he pointed the gun at me and told me to roll her over and see if she was dead, that he wasn't drunk, or he wasn't crazy, I mean, he was deliberate and cold." R. 50, lines 5–8.

We deem it expedient to quote further from the Turner case for the purpose of showing the basis for the rule therein stated. This Court said:

> "The true rule of action for an appellate court is stated in Wheeler v. United States, 159 U. S. 523, 40 L. ed. 244, 16 Sup. Ct. Rep. 93. In that case this

court was considering the admissibility, upon the trial of an indictment for murder, of the testimony of a boy five and a half years old at the time of the trial. The court, speaking by Mr. Justice Brewer, said (p. 524):

" 'The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review unless, from that which is preserved, it is clear that it was erroneous.'

"Though the question of competency in that case differed materially from the questions of competency in this case, the spirit which underlies the statement of the court there ought to govern here."

The Nevada Court in State v. Lewis said:

"When the opinions of such witnesses, from the necessities of the case, are received as evidence, the weight of their testimony does not depend so much upon the number as upon the intelligence of the witnesses, and their capacity to form correct opinions, their means of information, the unprejudiced state of their minds, and the nature of the facts and circumstances testified to in support of their opinions. It would, perhaps, be difficult to lay down any general rule establishing precisely the requisite knowledge which a witness must possess in order to justify or warrant the expression of an opinion. It may, however, be safely said that if the witness has had sufficient observation to enable him to form a belief upon the question he is a competent witness. The admissibility of this

character of testimony must necessarily be left, to a great extent, to the discretion of the presiding judge; and when the testimony is admitted, unless it clearly appears that there has been an abuse of that discretion, the appellate court ought not to interfere."

The Court further quoted with approval from Brown v. Commonwealth:

"Exactly what is meant by the expression in some cases, when such evidence has been admitted, that 'the witnesses must detail the facts upon which the opinion is based,' we do not find explained. If the admissibility of the opinion as evidence must depend upon the facts from which it is formed, it is manifest that there is a question for the court antecedent to its intrduction, and that to promulgate a general rule as to the amount and quality of the evidence that should satisfy the court in every case would be impossible. The court must be satisfied that the witness has had an opportunity, by association and observation, to form an opinion as to the sanity of the person in reference to whom he is to speak; but as to the extent and character of the evidence, no better rule can be established than to leave it within the discretion of the court."

In State v. Lewis the Court was dealing with the question as concerned a witness who had seen the accused many times, had eaten at the same table with him and saw him just before and immediately after the commission of the crime.

In State v. Plunkett, 62 Nev. 265, the Court in sustaining the State's objection to the competency of a lay witness, said:

"There was no improper exercise of discretion in this ruling. The witness has met defendant only twice and there is nothing to show that the meetings were otherwise than casual, *without opportunity for such*

> *observation as would have enabled the witness to form any judgment of value as to his mental condition.* (Italics supplied.) As said in State v. Lewis, 20 Nev. 333, 22 P. 241, 246: 'The court must be satisfied that witness has had opportunity, by association and observation, to form an opinion as to the sanity of the person in reference to whom he is to speak; but as to the extent and character of the evidence, no better rule can be established than to leave it within the discretion of the court.' "

In the final analysis the Turner case in this Court and the Lewis case in the Nevada Court leaves the question in the hands of the trial court to determine the competency of the lay witness. Witness Jack Watkins' testimony concerning a *significant act*, being in fact the testimony of the res gestae, was the sound basis of his opinion. Wilcox v. State, 28 S. W. 312. In State v. Jones, 20 N. W. 470, the Court said:

> "The conduct, language and appearance of the accused, being manifestations of his mental condition, may be shown in evidence. Of course, their force, as proof of sanity or insanity diminishes as they recede from the moment of the crime, in harmony with presumptions arising from known facts or observations and experience of men."

2. There is no merit to the contention that the decision of the Nevada Court is contrary to the common law. The highest Court of the State may administer the common law according to its own understanding without liability to a review by this Court, unless some right, title, immunity or privilege has been asserted and denied. Penn. R. Co. v. Hughes, 191 U. S. 477; Wheaton v. Peters, 8 Pet. (U. S.) 591.

3. No comment is necessary concerning the contention that the decision of the Nevada Court was contrary to Nevada law.

4. There is no constitutional requirement that Nevada Court must follow the law of any other State of the Union in deciding matters under Nevada law.

THE NEVADA COURT HAS NOT DEPRIVED PETITIONER OF DUE PROCESS OF LAW NOR THE EQUAL PROTECTION OF THE LAW AS PROVIDED IN THE FOURTEENTH AMENDMENT

(Point II)

As shown hereinbefore the record before this Court wholly fails to show that the petitioner in the trial court and in the State Supreme Court raised in and/or submitted to either court any federal question. The objection to the competency of the witness in the trial court and the assignment of error thereon to the State Supreme Court was rested entirely upon the alleged departure from the rule announced in the Nevada case of State v. Lewis. The opinion of the Nevada Supreme Court, without question, shows that that Court decided the matter upon State law and rested its decision on adequate State grounds. This Court well said in Southwestern Bell Teleph. Co. v. Oklahoma, 303 U. S. 206:

> We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it.

We submit that measured by the decision of this Court in Turner v. American Security and Trust Company case, supra, the decision of the Nevada Court, even if it can be said such

decision was necessarily based upon a federal ground, was correct and petitioner by reason thereof has not been deprived of due process of law nor of the equal protection of the laws.

The rulings of the State Court with respect to the admission of evidence is not subject to review in this Court. Barrington v. Missouri, 205 U. S. 483.

The Fourteenth Amendment leaves the States free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate, and it does not permit a party to bring to the test of this Court every ruling made in the course of a trial in a State Court. Buchalter v. New York, 319 U. S. 427.

The Trial Judge Did Not Abuse His Discretion in Admitting the Opinion Evidence of the Lay Witness

(Point III)

The discretion of the trial judge in the case at bar cannot well be measured by the facts and circumstances of the authorities cited by petitioner as showing that the exercise of such discretion deprived petitioner of substantial justice and a fair and impartial trial. Without here pointing out the facts and contentions submitted to this Court in the following cases as cited by petitioner we submit that none of them are in point as to facts, circumstances or principles of law and they do not control in this case. The cases: Duncan v. Missouri, 152 U. S. 382; State ex rel. Gaines v. Canada, 305 U. S. 337; Hines v. Davidowitz, 312 U. S. 52; Skinner v. Oklahoma, 316 U. S. 535; Southern R. Co. v. Greene, 216 U. S. 400; Chambers v. Florida, 309 U. S. 227; Mooney v. Holahan, 294 U. S. 103; Lisenba v. California, 314 U. S. 219.

The record before this Court shows conclusively that the objection to the introduction of the opinion of the lay witness in the trial court was upon the ground that the proper foundation therefor was not laid based upon the opinion of the State Court in

State v. Lewis. R. 45, line 12, to line 18, page 46. The record further shows that it was upon the ground that the proper foundation for the introduction of the opinion was the sole basis of the assignment of error in the State Supreme Court. Assignment No. 2, R. 17–19. The record here shows the State Supreme Court decided the matter solely upon State grounds. R. 25–30. And in so doing brought the case squarely within the decision of this Court in Barrington v. Missouri, 205 U. S. 483, where this Court said:

> "In our judgment no Federal Question was involved. Were this otherwise it would follow that we could decide in any case that the trial court abused its discretion under the laws of the State of Missouri, although the Supreme Court of that State had held to the contrary."

We respectfully submit that the Writ of Certiorari should be denied.

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